No. 11205

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VIOLA JUANITA HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

JUANA SATURNINO HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANTS' REPLY BRIEF.

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The several statements, specification of errors, and summary of argument, required by Rule 20 of this Court, are fully set forth at pages 1 to 13, inclusive, of Appellants' Opening Brief, to which reference is made.

In its brief, appellee contends that "The judgment in the case of St. Marie v. United States bound and concluded the parties hereto as to the subject matter of that action." (Br. p. 2.) Appellee also contends that "The issue in the former case was the right of appellants to trust patents

for the lands in suit," and then adds "That is the issue in this case." (Br. p. 4.) These statements of the matters involved in the two suits are more plausible than correct. Appellee further says, "Appellants are asserting the same causes of action that were determined in the St. Marie case," and that "The United States is not estopped to plead *res judicata.*"

I.

Appellants Are Not Asserting the Same Causes of Action That Were Litigated in the St. Marie Case.

The subject matter involved in the *St. Marie* case, as stated in the prayer of the complaint therein, was whether "the United States allotted to the complainant *on May 9, 1927,* for her sole use and benefit, the lands above described in this her bill of complaint." [Tr. p. 26.] As stated by the District Court, "We are to determine whether the plaintiffs acquired vested rights, the recognition of which we can compel." (*St. Marie v. United States,* 24 F. Supp. 237, at p. 239.) A better statement of the subject matter of the former suit would be: "The issue in the former case was the right of appellants *under the proceedings had and certificates of allotment issued in 1927,* to allotment trust patents for the lands in suit." Appellee overlooks the all-important fact that the former suit did not involve the proceedings had and the certificate of allotment that was issued in 1923; and it is this fact which clearly distinguishes the issue in the former case from the issue in the present case. The issue in the present case, as stated in the language of the complaint, is whether *"on the 21st day of June, 1923,* the United States allotted . . . in severalty to plaintiff . . . the lands

described in Paragraph III of this complaint." [Tr. p. 8.] Inasmuch as the issues are not the same in the two cases, it follows that the rules of law invoked by appellee are not here applicable or controlling.

Appellee admits, as indeed it must under the authorities cited in Appellants' Opening Brief, that "if a different claim or demand is involved in the subsequent action, the decision in the former case is not *res judicata.*" (Br. p. 4.) There can be no doubt as to the soundness of the principle of law thus stated. (See Op. Br. pp. 14-19.) It has almost unanimous approval by the State and Federal Courts, and is thoroughly imbedded in the decisions of the Supreme Court of the United States.

The important question here is, what constitutes a different issue from the one alleged to have been litigated and decided in the *St. Marie* case? First in importance, of course, is what was there *decided.* The judgment itself is not enlightening, for it decided only that "complainant take nothing by her action." [Tr. p. 35.] We must look to the opinions of the District Court and of this Court for the desired information. (*St. Marie v. United States,* 24 F. Supp. 237, affirmed 108 F. (2d) 876.)

In the opinion of the District Court it was said, at page 239 (24 F. Supp.):

> ". . . the facts, in the main, are undisputed. We are to determine whether the plaintiffs acquired vested rights, the recognition of which we can compel."

Following which, at page 23 (*id.*), that Court said:

> "It is evident that this procedure (*i. e.,* to complete an allotment) contemplates the following acts on the part of the Secretary:

(1) A determination that, in his opinion, the Indians have reached the degree of civilization spoken of in the Act.

(2) An order setting up the mechanics for selection.

(3) Actual allotments approved by the Secretary. These acts are all optional involving the exercise not of ministerial but of executive and almost quasi-judicial discretion and judgment."

The true basis of the District Court's decision is clearly shown by the following language of the opinion (*id.* p. 241):

"However, where, as here, discretion is lodged in the Secretary and the selector is not entitled to a patent until certain conditions precedent, dependent upon the action of the Secretary, are complied with, he cannot assert any rights until he has shown compliance with them."

Upon appeal this Court affirmed the judgment of the trial Court upon the grounds *inter alia* that the General Allotment Act does not confer upon the Palm Springs Band of the Mission Indians in California the right to select allotments and that said Act was not applicable to said Indians. By its opinion in the *St. Marie* case, this Court appears to have approved the grounds of the decision of the District Court in the following language (*St. Marie v. United States,* 108 F. (2d) 879):

"The trial court held that before there could be a valid allotment the Secretary must: (1) determine that the Indians have reached the degree of civilization required by the Act; (2) make an order 'Setting up the mechanics for selection'; and (3) make and

> approve actual allotments; that no allotment was made; and that if the certficates of selection could be considered as certificates of allotment the same were not effective because there had been no determination that the Indians in question were sufficiently advanced so as to comply with the Act, and the approval of the Secretary was lacking."

This Court declined to pass upon the power of the Secretary to determine when the Mission Indians are sufficiently advanced in civilization to warrant allotments in severalty, saying in that behalf (*id.* p. 881):

> "Since this is not a proceeding to compel action by the Secretary, we need not determine which meaning is correct."

From the above quoted, and other, language of the District Court and of this Court, and from the language of the bill of complaint in the *St. Marie* case, it is too clear for question that the decision therein involved only the right to allotment trust patents under and by virtue of the proceedings had, and the certificate issued, in 1927. The proceedings and certificate of 1923 were not involved in the former case. The claim litigated in the former case was whether under the proceedings and certificate of 1927, plaintiffs acquired rights to allotment trust patents, "the recognition of which . . . (the Court) can compel." (*Supra*) "Estoppel (cannot) extend beyond the point actually litigated or determined." (*Cromwell v. Sac. County*, 94 U. S. 351, 354. 24 L. Ed. 194, 195, and cases cited; also, *Title Guarantee & Trust Co. v. Manson*, 11 Cal. (2d) 631, and cases cited.) "A former judgment . . . operates as an estoppel . . . as to such issues in the second action as were actually litigated and determined in

the first action." (*Todhunter v. Smith,* 219 Cal. 690, 695.) A "prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted . . ." (*Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, 319, 47 S. Ct. 600, 602, 71 L. Ed. 1069.)

The judgment in the *St. Marie* case did not decide that appellants have no right to allotment trust patents for the lands in suit under the proceedings had and the certificates of allotment issued in 1923. Appellee has not directed this Court's attention to any part of the record in the *St. Marie* case showing that the right to allotment trust patents under the 1923 proceedings and certificates was, in that case, put in issue, litigated or decided, nor can it do so.

Moreover, the decisions of the District Court and of this Court in the *St. Marie* case decided mainly, if not entirely, questions of law relating to or arising out of the proceedings had and certificate issued in 1927. Both decisions, in effect, have been held to be erroneous by the Supreme Court of the United States in *Arenas v. United States,* 320 U. S. 733, 64 S. Ct. 1145, 88 L. Ed. 1363, and are therefore not controlling here either as *res judicata* or *stare decisis.*

As stated in Appellants' Opening Brief (pp. 18, 19), even correct decisions upon questions of law do not operate as *res judicata* in a subsequent action if a different issue is there involved, although the correct decision on a pure legal question might operate as *stare decisis* in the latter case. Obviously, an incorrect decision upon a question of law can have no force after it is overruled by the Supreme Court of the United States, and this is especially true when applied to a different demand in a later case.

(See authorities cited, Op. Br. pp. 18, 19.) In the present case the demand is different from the demand in the *St. Marie* case. The cases cited by appellee to the contrary are not convincing. In *Northern Pacific Railway v. Slaght,* 205 U. S. 122, 27 S. Ct. 442, 51 L. Ed. 742, the Supreme Court held that where plaintiff's title to land was placed directly in issue in both the former and later cases, the judgment in the former case was *res judicata* in the later case, the issue being the same.

The case at bar is not an action to quiet title as between adverse claimants. Title, as such, is not involved at all. The United States does not claim that it has any proprietary or beneficial interest in the lands involved in suit; clearly, it is a mere trustee for the owners of the land, whether tribal, or individual. On the other hand, appellants do not claim that they have acquired or that they are now entitled to fee simple title to the lands in question, nor are they asking for a conveyance to them of such a title. In reality, appellants seek only a judicial declaration that the acts, conduct, statements, promises, and proceedings of the Secretary of the Interior and the Allotting Agent, followed by the issuance of certificates of selections for allotment, in 1923 are sufficient, under the several applicable Acts of Congress pleaded and relied on herein, to entitle appellants to allotment trust patents under which, at the expiration of twenty-five years from the effective date thereof, to wit: June 21, 1923, appellants will be entitled to patents in severalty conveying the title in fee simple to them. This issue did not arise nor was it litigated or decided in the *St. Marie* case.

The statute under which the prior, as well as the present, action was instituted plainly authorizes declaratory relief. (28 Stats. 286, 25 U. S. C. A., sec. 345.) No coercive

relief was sought in the former case, and this clearly appears from this Court's concluding statement that, "Since this is not a proceeding to compel action by the Secretary, we need not determine which meaning is correct." (*St. Marie v. United States,* 108 F. (2d) 876, 881.) Nor is coercive relief sought in the present case. It therefore follows that no injury could have resulted to the United States in the former case, and that none can result to it in the present case.

A suit to declare the right to an allotment of land under one set of proceedings, and a suit to declare the right to an allotment of the same land under a different set of proceedings and regulations do not necessarily create the same estate or cause of action. If, for example, the decision in the *St. Marie* case had been for the plaintiffs therein, the judgment would have given appellants the right to an allotment as of May 9, 1927, and the trust period would have begun to run only from that date; whereas, if judgment had been for appellants in the present case, the trust period would begin to run from June 23, 1923. Thus, different estates are shown to be involved in the two cases.

The present suit rests upon allotment proceedings which terminated on June 23, 1923, and appellants' rights thereunder are reinforced by estoppel arising out of the placing of valuable improvements upon the lands allotted to them. The issue as to estoppel and as to the validity of the 1923 allotment proceedings could not have been litigated under the pleadings in the former action. Since no relief was granted to the United States in the former action, no prejudice can result to it by the present action. Moreover, as above indicated, an allotment estate be-

ginning in 1927, with a restriction upon alienation thereof until 1952, is not the same estate as an allotment of the same area made in 1923, with a restriction upon alienation terminating in 1948. Besides, four years of rents, issues and profits under the present action were not involved, and could not have been involved, in the prior action. In other words, the terms of the estates of appellants under the two sets of proceedings are different.

Not only is the estate in the lands as of 1923 a different estate and tenure than was involved in the proceedings had in 1927, but appellants have a vested undivided interest in the lands aside from the allotment proceedings here involved. Have they lost this right too by the former judgment? The United States asserted no estate in the lands in itself. The former decree, as to the United States, does nothing more than confirm in it a policy that has since been declared erroneous in the *Arenas* case. The United States neither sought nor could have obtained affirmative relief. The relief granted was only negative in character. Where such negative relief rests solely on a matter of policy that has since been declared erroneous, if not illegal, it should not, and we believe cannot, operate to deprive these Indians of a vested right.

Furthermore, under the facts set up in the motion for summary judgment herein, other members of the Tribe are favored over appellants, and the value of the improvements placed by appellants on the lands allotted to them becomes the common property of the Tribe with resultant great and irreparable detriment to appellants.

II.

The United States Is Estopped to Plead Res Judicata.

Practically all of the points advanced under topic No. I are applicable here. The doctrine of estoppel *in pais* should apply to the United States under the facts here present. It has no proprietary or vested interests in the Mission Indian lands. The title to the unallotted lands is in the Tribe. The United States has only a trusteeship, sometimes called a guardianship, over the Indians and their lands. It is its duty to protect them, and, where an individual has rights peculiar to himself, it is likewise its duty to protect such rights, even against the remaining members of the Tribe.

It would be unjust and inequitable in the extreme for Lee Arenas to have his allotment validated and the Hatchitts, under the same allotment proceeding, have their allotments declared illegal.

The only interest the United States could have in opposing the plaintiffs in this case is to continue to assert a policy that was declared erroneous, if not illegal, by the Supreme Court of the United States in the *Arenas* case.

When these allotments were legally made, it became and remains the duty of the United States to protect the individual Indians in the enjoyment of their respective claims. The duty to the Tribe as a whole at this point becomes subordinate to the rights of the allottees. The United States cannot benefit either the Tribe or the allottees by urging the doctrine of *res judicata* in this case and for this reason the rule of estoppel should be applied. The present actions are test cases for practically all of the allottees mentioned in the so-called *St. Marie* case judgments.

Appellee's contention that "The United States is not estopped to plead *res judicata*" (Br. pp. 7-9), as applied to the facts pleaded in the Complaint, is not supported by the cases cited. As stated in the opening brief (p. 23) "The United States is not to be estopped when acting in the capacity of a sovereign." In each of the three cases cited by appellee (*Cherokee Nation v. United States,* 270 U. S. 476, 486; *Klamath Indians v. United States,* 296 U. S. 244; *United States v. Klamath Indians,* 304 U. S. 119) the claim or right involved arose out of a treaty between the Indians and the United States. The making of treaties by the United States is an exercise of its sovereign power. (Article II, Section 2, par. 2, Constitution of the United States.) The sovereign cannot be sued without its consent, which, of course, requires the enactment of a statute consenting to suit. These principles fully explain the decisions of the Supreme Court in the cited cases, *supra,* and distinguish them from the case at bar.

The decision of the Supreme Court in *United States v. Shoshone Tribe of Indians,* 304 U. S. 111, 58 S. Ct. 794, 82 L. Ed. 1213, does not sustain appellee's contention "that in this type of case the Government's relation to the Indians is that of a sovereign." (Br. p. 9.) In that case the Supreme Court clearly indicated the relationship of the United States with the Shoshone Indians as follows:

> ". . . Although the United States always had legal title to the land (all reservation land) and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate

> to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, *not the exercise of guardianship or management,* but confiscation." (pp. 115, 116, 304 U. S.; Italics ours.)

And at page 117, the Court said:

> "As transactions between a *guardian and his wards* are to be construed favorably to the latter, doubts, if there were any, as to ownership of the lands, minerals, or timber would be resolved in favor of the tribe." (Italics ours.)

To excuse its dereliction of duty appellee condemns appellants' argument as "moralistic," and in the next sentence (Br. p. 8) says "The paramount Govermental duty here is to protect the interests of all the Palm Springs Indians . . ." The statement would be more effective if the Government's conduct over a period of many years had conformed to the statement. A few facts are in order. From the passage of the Mission Indian Act in 1891 to 1917, the Government did nothing whatever to secure to appellants and others similarly situated allotments in severalty in the tribal lands. In 1917, Congress commanded action, directing the Secretary to cause allotments to be made to the Indians on the Mission Reservations. (Act of 1917; *Arenas v. United States,* 322 U. S. 426.) Four years later the Secretary appointed an Allotting Agent. Two years thereafter, the Allotting Agent completed the making of allotments to all members of the Palm Spring Band. Then four more years elapsed without further action. The Agent then made reallotments to such members of the Band as made selections for allotment. Then the Government waited seventeen more years,

when, on December 14, 1914, the Secretary awoke from his long sleep and disapproved all allotments made in 1927. Such a course of conduct does not justify the smug assumption that the Government has been performing its "paramount Governmental duty," nor does such conduct invite confidence that there will be prompt performance of such duty in the future. Meanwhile, as to all of the older members of the Band, performance of such duty, because of death of such members, will become unnecessary.

III.

The Doctrine of Equitable Estoppel May Be Asserted Against the United States in This Suit.

Appellee refers to the argument on estoppel made in its opening brief in the *Arenas* case (Br. pp. 29-34) and adopts that argument in this case. Appellee cites only two cases (*Utah Power & Light Co. v. United States,* 243 U. S. 389; *Yuma Water Ass'n v. Schlecht,* 262 U. S. 138) in support of its position. Those cases are not in point here, as stated in our opening brief (pp. 23, 24) and are clearly distinguishable from the case at bar.

In *Utah Power & Light Co. v. United States,* 243 U. S. 389, 37 S. Ct. 387, 61 L. Ed. 791, *supra,* the Power Company contended that the United States was estopped to question its right to use public lands as sites for works employed in generating and distributing electric power because agents in the forestry service and other government offices, with knowledge of what the power companies were doing, did not object and impliedly acquiesced therein until the works were completed and put into operation. The

Supreme Court, in answer to this contention, said, at p. 391 (37 S. Ct.):

> "Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done *what the law does not sanction or permit.* (Citing cases.)" (Italics ours.)

In *Yuma County Water Users' Ass'n v. Schlecht,* 261 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909, *supra,* plaintiffs brought suit to enjoin the defendants, who were officials of the Reclamation Service, from putting into operation the determination of the Secretary of the Interior that the construction cost of the irrigation project involved was $75 per acre. The plaintiffs contended that the report of consulting engineers, a letter from the Director of the Geological Survey, correspondence between officials of the Service and Association, and other statements, showed that the construction cost to the users would not exceed $35.28 per acre. In this connection the Supreme Court said, at p. 500 (43 S. Ct.):

> "Prior to the making of the construction contracts, opinions expressed by engineers or officials may be estimates in one sense; but they are tentative and preliminary, and cannot be regarded as constituting the required statutory estimate, though contributing to the basic facts upon which it is made. (Citing cases.) The statute contemplates a precise and formal public notice which must state the lands irrigable under the project, the limit of area for each entry, *the charge to be made per acre,* the number of annual installments and the time when the payments shall commence. *The opinions, correspondence, and statements relied upon do not fulfill the statutory requirements,* and we must hold that the government is

neither bound nor estopped by them. (Citing cases.) Moreover, the contract of 1906, made subsequently, expressly provides for payment on the part of the water users 'for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders.' Plainly this looked forward to future action on his part, and did not rest upon any action already taken." (Italics ours.)

It is clear that the Supreme Court based its decision in the two cases quoted from, *supra,* upon the ground that the United States may not be estopped by the *unauthorized* acts of its officers and agents, and those decisions decided nothing more in reference to estoppel. It is also clear that those decisions have no application to the case at bar, since here the Secretary of the Interior and the Alloting Agent were authorized by the several Acts of Congress pleaded and relied upon to do the acts and make the representations, statements, and promises constituting grounds for the estoppel here invoked.

Conclusion.

Wherefore, appellants pray that the judgments herein be reversed and that these causes be remanded to the District Court for trial on the issues made by the complaints and answers of the parties.

Respectfully submitted,

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